Supreme Court, U.S.
FILED
NOV 27 1998
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(4)

No. 97-1985

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1998

ELLIS E. NEDER, JR.,
*Petitioner,*

v.

UNITED STATES,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## BRIEF OF AMERICAN COUNCIL OF LIFE INSURANCE, HEALTH INSURANCE ASSOCIATION OF AMERICA AND NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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## INTERESTS OF *AMICI CURIAE*

*Amici* are among the principal business associations in the United States.[1]

The American Council of Life Insurance ("ACLI") is the nation's largest nonprofit life insurance trade association. ACLI is composed of 532 member companies, which together underwrite 89 percent of the life insurance currently in force in the United States. ACLI has represented its members in legislative and administrative matters, and has submitted *amicus curiae* briefs on behalf of its members in state and federal courts throughout the country.

The Health Insurance Association of America ("HIAA"), based in Washington, D.C., is one of the largest associations of health insurance companies in the world. HIAA is an advocate for the private, market-based health insurance system. Its more than 225 members provide medical expense and supplemental insurance, as well as long-term care insurance and disability income protection to more than 110 million Americans. HIAA develops and advocates federal and state policies which build upon the U.S. health care system's quality, affordability, accessibility and responsiveness.

The National Association of Manufacturers ("the NAM") is the nation's oldest and largest broad-based industrial trade association. Its nearly 14,000 member companies and subsidiaries, including 10,000 small manufacturers, employ approximately 85 percent of all

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[1] Letters from the parties consenting to the filing of this brief have been filed with the Court. No counsel for either party authored this brief in whole or in part, and no person or entity other than the *amici curiae* and their counsel made any monetary contribution to the preparation or submission of this brief.

manufacturing workers and produce more than 80 percent of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with the NAM through its Associations Council and National Industrial Council.

*Amici*'s interest in this case stems from the critical role that materiality plays in curbing frivolous civil litigation for fraud. This Court's determination whether materiality is an element of the federal offenses of mail fraud, wire fraud and bank fraud will inevitably affect such litigation, in particular because mail and wire fraud are the "predicate acts" most commonly relied on by civil litigants under the federal Racketeering Influenced and Corrupt Organizations Act ("RICO"). If this Court were to find that materiality is *not* an element of federal mail or wire fraud, the lure of treble damages under RICO would almost certainly prompt a plethora of civil suits based on frivolous claims that would not survive the test of materiality.

The *amici* insurance associations note that, under the McCarran-Ferguson Act of 1945, 15 U.S.C. § 1011 *et seq.*, a federal statute that, like the federal fraud statutes at issue in this case, does not "specifically relate to the business of insurance" may be applied to insurance only where such application does not "invalidate, impair, or supersede" state law. *Id.* § 1012(b). Despite this broad preclusion of federal law's application to insurance, the insurance association *amici* have an interest in this case. First, the scope and meaning of "invalidate, impair, or supersede" in the McCarran-Ferguson Act are currently under review by this Court. *See Humana* v. *Forsyth*, No. 97-303 (scheduled for oral argument Nov. 30, 1998). Second, even if the Court correctly interprets that phrase to the full extent of its intended breadth, there may still be circumstances in which the application to insurance of the federal mail fraud, wire fraud or bank fraud statutes, or one of the many similar federal fraud statutes that do not specifically relate to insurance, would not effectively "invalidate, impair or



supersede" state law. Accordingly, while fully adhering to their position (including as *amici* in *Humana* v. *Forsyth*) that Congress intended the McCarran-Ferguson Act to preclude virtually all claims involving the application to insurance of federal statutes not specifically related to the insurance business, the insurance association *amici* join with the NAM in urging the Court to recognize, as Congress intended, that materiality is an element of the federal offenses of mail fraud, wire fraud and bank fraud.

## SUMMARY OF ARGUMENT

The federal mail fraud, wire fraud and bank fraud statutes, 18 U.S.C. §§ 1341, 1343 and 1344 ("Sections 1341, 1343 and 1334), all prohibit any "scheme or artifice" to "defraud" or to obtain money or property "by means of false or fraudulent pretenses, representations, or promises." None of these three statutes expressly uses the term "material." However, each of these statutes implicitly incorporates the element of materiality.

Congress did not need to use the term "material" in the federal mail fraud, wire fraud and bank fraud statutes in order to indicate that these statutes proscribe only material misrepresentations or concealments. Both at the time of the mail fraud statute's original enactment in 1872 and later, when the mail fraud statute was amended and the wire fraud and bank fraud statutes were adopted, it was commonly understood that materiality is an integral element of the offense of fraud. Given this understanding, express use of the term "material" was not necessary to confine the proper application of Sections 1341, 1343 and 1344 to communications or concealments of a material nature.

"Fraud" and "defraud" were defined in numerous legal dictionaries published in the late 19th and early 20th centuries, as they are today, with reference to the element of materiality. For example, the 1904 edition of West's

*Judicial and Statutory Definitions of Words and Phrases* provides:

> Fraud consists in the misrepresentation or concealment of a *material* fact calculated to deceive the opposite party.
>
> A misrepresentation of *material* facts is a fraud.

1 West's JUDICIAL AND STATUTORY DEFINITIONS OF WORDS AND PHRASES 2951 (1904) (case citations omitted) (emphasis supplied). Similarly, *Bouvier's Law Dictionary* of 1897 defines "fraud" as, *inter alia*, "the misrepresentation by word or deed of material facts." BOUVIER'S LAW DICTIONARY 844 (1897). These and other contemporaneous dictionaries reflect, and indeed expressly cite, the established body of case law on materiality as an element of fraud.

In *United States* v. *Wells*, 117 S. Ct. 921, 927 (1997), this Court confirmed its established presumption that "Congress incorporates the common-law meaning of the terms it uses if those 'terms . . . have accumulated settled meaning under . . . the common law' and 'the statute [does not] otherwise dictat[e].' " (quoting *Nationwide Mut. Ins. Co.* v. *Darden*, 503 U.S. 318, 322 (1992) (quoting *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 739 (1989))). Neither the language nor the legislative history of Sections 1341, 1343 and 1344 contains any evidence to rebut the presumption that, in proscribing "fraud" in these statutes (through *inter alia*, use of the term "defraud"), Congress meant to incorporate the established common-law meaning of that term.

The court of appeals below plainly erred in finding otherwise. The court below reached its erroneous conclusion through a fundamental misunderstanding of the lessons of *Wells*. First, the court failed to understand the significance



found by this Court in *Wells* with respect to the enactment of the statute at issue in that case, 18 U.S.C. § 1014 ("Section 1014"), as part of the recodification of the federal criminal code in 1948. As the Court explained in *Wells*, Section 1014 emerged from the 1948 recodification as a consolidation of a number of preexisting provisions, some of which had expressly used the term "material." Thus, it could be inferred that Congress specifically intended *not* to include materiality as an element of Section 1014. *Id.* at 928. In contrast, the 1948 enactment of Section 1341 involved merely renumbering and simplifying certain language of the original mail fraud statute, with no change in meaning. Thus, the significance of the 1948 recodification that the *Wells* Court found with respect to Section 1014 simply does not exist with respect to Section 1341.

Second, the court of appeals overlooked other key distinctions between Section 1014 and Sections 1341, 1343 and 1344 that indicate that the latter statutes implicitly incorporate the element of materiality. Foremost among these is an obvious textual distinction: Section 1014 prohibits "false statements," whereas Sections 1341, 1343 and 1344 prohibit schemes to "defraud." The term "false statement" "carries no general suggestion of influential significance." *Wells*, 117 S. Ct. 926-27 (citing *Kungys*, 485 U.S. at 781). "Defraud," however, inherently *does* suggest influence. Indeed, the very *existence* of a fraud depends on its influential significance.

There is also a critical distinction between Section 1014 and Sections 1341, 1343 and 1344 with respect to inferences of congressional intent. As noted, there is no indication that in enacting Sections 1341, 1343, and 1344, Congress intended to eliminate the element of materiality from the statute. Moreover, it was never contended in *Wells* that the term "false statements" has a settled, common-law meaning that incorporates materiality. *Wells*, 117 S. Ct. at 927. Here, there is a vast body of case law, reflected in

late 19th and 20th century dictionary definitions of "fraud" and "defraud," confirming that those terms have a longstanding common-law meaning incorporating materiality.

Further, as the Court in *Wells* emphasized, certain terms may implicitly carry a requirement of materiality while others do not. *See Wells*, 117 S. Ct. at 927, n.10 (noting that "*Kungys* distinguished between the common-law meaning of 'misrepresentation' and 'false testimony,' concluding that while the former had been held to carry a materiality requirement in many contexts, the terms 'false' or 'falsity' did not as frequently carry such an implication."). Since "defraud" has always carried an implicit requirement of materiality, both the plain language and the legislative history of Sections 1341, 1343 and 1344 support the conclusion that materiality is an element of federal mail fraud, wire fraud and bank fraud.

This Court's decision regarding the implicit element of materiality in Sections 1341, 1343 and 1344 will have much broader ramifications than just with respect to prosecutions under those three statutes. The decision will also affect prosecutions under the other criminal statutes with language parallel to that of Sections 1341, 1343 and 1344. Further, the decision will affect the application of *civil* statutes whose language parallels that of Sections 1341, 1343 and 1344. *See, e.g.*, 15 U.S.C. § 77q(a)(1) ("device, scheme, or artifice to defraud"); 15 U.S.C. § 1703(a)(2)(A) (same). Finally, the decision will have an obvious and potentially significant impact on litigation, particularly civil litigation, under the federal Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 ("RICO"). Mail and wire fraud are by far the most commonly relied-on predicate acts for civil RICO claims, and a ruling by this Court that materiality is not an element of federal mail fraud or wire fraud would invite a plethora of unwarranted civil suits under RICO.



The broad definitions of fraud in the mail fraud, wire fraud and bank fraud statutes already enable relatively innocuous and common commercial disputes to be challenged as "racketeering activity" under RICO. The requirement to prove materiality in order to establish liability for mail fraud, wire fraud or bank fraud is a critical curb on an even broader sweep of RICO into areas of essentially innocuous business activity. Absent that curb, virtually any misleading comment in the course of regular business dealings, however trivial and ineffectual, could give rise to treble damages under RICO. Congress cannot plausibly have intended this result.

Of course, Sections 1341, 1343 and 1344 are not the only statutes specifying offenses that are predicate acts under RICO. Many of the other "predicate act" statutes have language very similar to that of Sections 1341, 1343, and 1344. To date, courts have interpreted these other statutes implicitly to require proof of materiality. *See, e.g., United States* v. *West Indies Transport, Inc.*, 127 F.3d 299, 304 (3d Cir. 1997) (18 U.S.C. § 1546 ("procured by fraud")), *cert. denied*, 118 S. Ct. 700 (1998). If this Court were to find that materiality is *not* an element of Sections 1341, 1343 and 1344, claims regarding violations of these other statutes, in addition to Sections 1341, 1343 and 1344, could spawn unwarranted civil RICO litigation.

This Court has explicitly emphasized the importance of materiality as an element of fraud. *See, e.g., Basic, Inc.* v. *Levinson*, 485 U.S. 224, 231 (1988) (explaining that it is important to be "careful not to set too low a standard of materiality" in order to exclude trivial omissions). In *Kungys* v. *United States*, 485 U.S. 759, 780 (1988), the Court described the effect of removing the element of materiality as "draconian." Again, in *Wells*, the Court recognized that materiality operates as a limit to making "a surprisingly broad range of unremarkable conduct a violation of federal law." 117 S. Ct. at 931 (quoting *Williams* v. *United States*,

458 U.S. 279, 287 (1982)). The Court has, therefore, already observed the dangers of excluding materiality from such key statutes as those at issue here. Given the plain language and legislative history of these three particular statutes, there is every reason to abide by the presumption that Congress intended to incorporate the common law meaning of the terms used in Sections 1341, 1343 and 1344, including the element of materiality.

Consistent with this presumption and other established principles of statutory construction, the Court should hold that materiality is element of federal mail fraud, wire fraud and bank fraud.

## ARGUMENT

### I. A PROPER CONSTRUCTION OF THE FEDERAL STATUTES PROSCRIBING MAIL FRAUD, WIRE FRAUD AND BANK FRAUD COMPELS THE CONCLUSION THAT EACH OF THESE OFFENSES INCLUDES THE ELEMENT OF MATERIALITY

The federal mail fraud and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343 ("Sections 1341 and 1343"), both provide, in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . [uses the U.S. mails (Section 1341) or means of interstate or foreign wire, radio or television communication (Section 1343)] for the purpose of executing such scheme or artifice . . . shall be fined under this title or imprisoned not more then five years, or both.



The federal bank fraud statute, 18 U.S.C. § 1344 ("Section 1344"), in near-identical language, proscribes a "scheme or artifice" to "defraud" a financial institution or to obtain the property of such an institution "by means of false or fraudulent pretenses, representations, or promises."

Congress did not use the term "material" in the federal mail fraud, wire fraud and bank fraud statutes. Congress had no need to make such explicit reference because, both at the time of the mail fraud statute's original enactment in 1872 and thereafter, it was commonly understood that materiality is an integral element of the offense of fraud. Given this understanding, it was unnecessary for Congress to expressly use the term "material" in order to confine the statutory prohibition to conduct of a material nature.

#### A. The Language and History of the Federal Mail Fraud, Wire Fraud and Bank Fraud Statutes Dictate That These Statutes Require Proof of Materiality

Whether Sections 1341, 1343 and 1344 implicitly include a materiality element is a matter of statutory interpretation. As this Court has recognized, " 'the starting point in any case involving the meaning of a statute, is the language of the statute itself.' " *United States Dep't of Treasury* v. *Fabe*, 508 U.S. 491, 500 (1993) (quoting *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, 210 (1979)). In this case, the key language to be interpreted is the phrase "scheme or artifice to defraud." In particular, given that Sections 1341, 1343, and 1344 prohibit "fraud," it is critical to glean the intended meaning of "fraud" and "defraud."

Congress did not define "fraud" or "defraud" in the mail fraud, wire fraud or bank fraud statutes. Accordingly, these terms must be assumed to bear their ordinary meaning.

*Asgrow Seed Co.* v. *Winterboer*, 513 U.S. 179, 187 (1995). As used in the mail fraud statute, and therefore by implication in the wire fraud and bank fraud statutes as well, *see Carpenter* v. *United States*, 484 U.S. 19, 25 n.6 (1987) (it is appropriate to apply the same analysis to mail and wire fraud offenses based on the language shared by the two statutes); S. REP. NO. 98-225, at 378 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3519 (the bank fraud statute was "modeled on the present wire and mail fraud statutes"), these terms presumably had the meaning reflected in dictionaries roughly contemporaneous with the enactment of the federal mail fraud statute in 1872. *See, e.g.*, *MCI Telecomm.* v. *American Tel. & Tel. Corp.*, 512 U.S. 218, 228 (1994); *see also Smiley* v. *Citibank, N.A.*, 517 U.S. 735, 745 (1996) (using 19th century dictionaries to interpret the term "interest" in the National Bank Act of 1864); *Smith* v. *Wade*, 461 U.S. 30, 60 n.3 (same, regarding the term "malice" in § 1 of the Civil Rights Act of 1871).

The definitions of "fraud" and "defraud" in those dictionaries confirm that, by the late 19th century, "materiality" was well-established as an element of fraud. For example, the Anderson *Dictionary of Law* published in 1893 defines "fraud" by explaining, *inter alia*, that false statements amount to fraud only where they are knowingly false *and* material:

> *[T]he fact that they are material is proof of an attempted fraud*, because their materiality, in the eye of the law, consists in their tendency to influence the conduct of the party who has an interest in them, and to whom they are addressed.

WILLIAM C. ANDERSON, A DICTIONARY OF LAW 475 (1893) (citing case law) (emphasis supplied). *See also id.* at 882 ("Where a party, by words or deeds, intentionally misrepresents a *material* fact, or produces a false impression,



in order to mislead or to obtain an undue advantage of another, he is chargeable with positive fraud") (emphasis supplied).

Likewise, the 1904 edition of West's *Judicial and Statutory Definitions of Words and Phrases* provides:

> Fraud consists in the misrepresentation or concealment of a *material* fact calculated to deceive the opposite party.
>
> A misrepresentation of *material* facts is a fraud .... If a misrepresentation was of a trifling or immaterial thing ... there is no reason to interfere to grant relief on the ground of fraud.

1 West's JUDICIAL AND STATUTORY DEFINITIONS OF WORDS AND PHRASES 2951 (1904) (case citations omitted) (emphasis supplied). This 1904 dictionary further defines "actionable fraud" as "a deception practiced in order to induce another to part with property or to surrender some legal right," specifically stating that "[t]he false statement must be *material*" to be actionable. *Id.* at 147 (emphasis supplied). Similarly, the 1891 edition of Black's *Dictionary of Law* states that "[f]raud, as applied to contracts, is the cause of an error bearing on a *material* part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other." BLACK'S DICTIONARY OF LAW 517 (1st ed. 1891) (emphasis supplied).

Other roughly contemporaneous dictionaries likewise emphasize the materiality element of fraud. *See, e.g.*, 1 ABBOTT'S DICTIONARY OF TERMS AND PHRASES 522 (1879) ("Fraud, in its general acceptation, may be defined [as] the misrepresentation or concealment of a material fact."); *id.*, Vol. II, at 113 ("A false representation, though no

breach of [an insurance] contract, if material, avoids the policy on the ground of fraud"); BOUVIER'S LAW DICTIONARY 844 (1897) (defining "fraud" as, *inter alia*, "the misrepresentation by word or deed of material facts" and stating: "Where a party intentionally or by design misrepresents a material fact or produces a false impression, in order to mislead another, or to obtain an undue advantage of him, there is positive fraud in the fullest sense of the term"); BOUVIER'S LAW DICTIONARY AND CONCISE ENCYCLOPEDIA 2227 (8th ed. 1914) ("So the mere puffing of articles to be sold is held not to amount to such a misrepresentation as will amount to fraud.").

Plainly, materiality was inherent in the concept of fraud at the time the federal mail fraud statute was enacted. By proscribing "any scheme or artifice to defraud" in that statute, Congress can only plausibly have intended to prohibit *materially* deceptive communications or concealments. As Petitioner has amply demonstrated, the legislative history of the mail fraud statute, while notably scant, supports such a conclusion. *See* Brief of Petitioner ("Pet. Br.") at 38-41.[2] There is nothing in either the language or the legislative history of the mail fraud, wire fraud or bank fraud statutes to rebut the proper presumption that, in using the terms "defraud" and "fraudulently" in these statutes, "Congress mean[t] to incorporate the established meanings of these terms" under common law. *NLRB* v. *Amax Coal Co.*, 453 U.S. 322; 329 (1981).[3]

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[2] For further history on the mail fraud statute, *see* Jed S. Rakoff, *The Federal Mail Fraud Statute* (Part I), 18 DUQ. L. REV. 771, 779-87 (1980); Donald V. Morano, *The Mail-Fraud Statute: A Procrustean Bed*, 14 J. MARSHALL L. REV. 45, 45-47 & n.2 (1980).

[3] Notably, the Department of Justice, in a memorandum submitted for the record of the House of Representatives in 1994,

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### B. Recognizing Materiality as an Element of Federal Mail Fraud, Wire Fraud and Bank Fraud Is Consistent with This Court's Decision in *United States* v. *Wells*

In the decision below, the Court of Appeals for the Eleventh Circuit justified its holding that materiality is not an element of Sections 1341, 1343 and 1344 by reference to this Court's decision in *United States* v. *Wells*, 117 S. Ct. 921 (1997). *See* Appendix to Petition ("Pet. App.") at 6a-9a. Specifically, the court of appeals reasoned that Sections 1341, 1343 and 1344 do not include a materiality element because they share with 18 U.S.C. § 1014 ("Section 1014") the characteristics of that statute that led the Court in *Wells* to find that Section 1014 lacks a materiality element. *Id.* Focusing on Section 1341 (since Sections 1343 and 1344 were patterned on Section 1341), the court of appeals identified two such shared characteristics: first, a lack of express use of the term "material," and second, enactment as part of the recodification of the federal

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emphasized the materiality element in the federal mail fraud statute. In defending proposed bankruptcy fraud legislation against criticisms of potential overbreadth, the Justice Department stated:

> The [p]roposed [legislation], patterned after the mail and wire fraud statutes (18 U.S.C. §§ 1341, 1343), would require proof of devising or intending to devise a "scheme or artifice to defraud." Like the mail fraud statute, an essential element of the proposed statute . . . [is] the requirement that any fraud be 'material" (while not in any statutory language, "materiality" is an element of bankruptcy fraud as well) . . . .

140 Cong. Rec. H10773 (daily ed. Oct. 4, 1994).

criminal code in 1948. *Id.* at 7a, 9a. Based on these two shared characteristics, the court of appeals concluded, there is no element of materiality in Section 1341, 1343 or 1344.

Of course, the court of appeals was accurate in observing that Sections 1341, 1343 and 1344 are similar to Section 1014 in lacking an express use of the term "material." The court was *not* accurate, however, regarding the significance of the enactment of Section 1341 as part of the 1948 recodification of the federal criminal code. As Petitioner has explained, the enactment of Section 1341 in the 1948 recodification involved nothing more than renumbering and simplifying certain language of the original mail fraud statute, with no change in meaning. Pet. Br. at 47. In contrast, as the Court in *Wells* observed, the enactment of Section 1014 involved consolidating a number of preexisting provisions, some of which expressly included the term "material," and Congress eliminated that term as part of the 1948 recodification. Thus, the significance of the 1948 recodification for Section 1014 that this Court identified in *Wells* simply does not exist with respect to Section 1341.

In fact, contrary to the court of appeals' view, there are numerous important distinctions between Section 1014 and Sections 1341, 1343 and 1344, each of which suggests that the decision regarding implied materiality in this case should be the opposite of that in *Wells*. First, there is a critical textual distinction between Section 1014 and Sections 1341, 1343 and 1344. The former prohibits "false statements," while the latter prohibits schemes to "defraud."[4]

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[4] The additional prohibition of "false or fraudulent pretenses, representations, or promises" in Sections 1341, 1343 and 1344 is integrally tied to, if not subsumed in the prohibition of schemes to "defraud." *See* Pet. Br. at 31 n.14 (citing *McNally* v. *United States*, 483 U.S. 350, 357-59 (1987)). Moreover, "pretenses," "representations" and "promises" are all terms that, in contrast to

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In *Wells*, this Court considered whether the term "false statement" itself suggests a materiality element. Noting that, as determined in *Kungys* v. *United States*, 485 U.S. 759, 770 (1988), a statement is "material" if it "has a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it was addressed," the *Wells* Court found that the term "false statement" in Section 1014 "carries no general suggestion of influential significance." *Wells*, 117 S. Ct. 926-27 (citing *Kungys*, 485 U.S. at 781). However, "defraud" inherently *does* suggest influence. Indeed, the very *existence* of a fraud depends on its influential significance. One can only "defraud" another through influence; unlike a false statement, a "fraud" *requires* influence.

Second, there is a critical distinction between Section 1014 and Sections 1341, 1343 and 1344 with respect to inferences of congressional intent. In *Wells*, the Court reiterated its established presumption that "Congress incorporates the common-law meaning of the terms it uses if those 'terms . . . have accumulated settled meaning under . . . the common law' and 'the statute [does not] otherwise dictat[e].' " *Wells*, 117 S. Ct. at 927 (quoting *Nationwide Mut. Ins. Co.* v. *Darden*, 503 U.S. 318, 322 (1992) (quoting *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 739 (1989)). In *Wells*, there were no claims about the settled meaning of "false statements" at common law. *Wells*, 117 S. Ct. at 927. Here, however, it is amply evident that "fraud" and "defraud" have firmly established meanings under common law and that these meanings incorporate a materiality requirement. *See BMW of North America* v. *Gore*, 517 U.S. 559, 579 (1996) ("actionable fraud requires a *material* misrepresentation or omission") (citing

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"statements," suggest the essence of materiality element: having a "tendency to influence." *See* Pet. Br. at 46.

RESTATEMENT (SECOND) OF TORTS § 538 (1977)); W. PAGE KEETON ET AL., PROSSER AND KEETON ON LAW OF TORTS § 108 (5th ed. 1984), (emphasis supplied). *See also* STUART M. SPEISER ET AL., THE AMERICAN LAW OF TORTS § 32:63 (1992) ("One of the fundamental principles of the law of fraud and deceit is that to constitute fraud in any case, the facts misrepresented or concealed must be material facts which substantially affect the interests of the person alleged to have been defrauded."). Further, the evidence indicates that Congress intended to incorporate the common law meanings of "fraud" and "defraud" in Sections 1341, 1343 and 1344. *See* Pet. Br. at 33-35.

Finally, as discussed above, the legislative history of Section 1014 distinguishes that statute from Sections 1341, 1343 and 1344. Since Congress actually removed the term "material" from certain of the provisions consolidated into Section 1014 in 1948, it may be reasonable to infer, as found by the Court in *Wells*, that Congress intended *not* to include a materiality element in that statute. However, Congress *never* used the term "material" in Section 1341 or its predecessor statute, and therefore it would *not* be reasonable to make the same inference here. In fact, there is absolutely nothing in the legislative history of Section 1341 (or that of Sections 1343 and 1344) to support such an inference. *See* Pet. Br. at 38-41; Rakoff, *supra*, at 782; Morano, *supra*, at 45-47.

As the Court in *Wells* emphasized, certain terms may implicitly carry a requirement of materiality while others do not. *See Wells*, 117 S. Ct. at 927, n.10 (noting that "*Kungys* distinguished between the common-law meaning of 'misrepresentation' and 'false testimony,' concluding that while the former had been held to carry a materiality requirement in many contexts, the terms 'false' or 'falsity' did not as frequently carry such an implication"). Thus, in *Kungys*, the Court found that although the prohibition of a "willful misrepresentation" in 8 U.S.C. § 1451(a) (which



expressly uses the term "material") includes a materiality element, the separate prohibition against giving "false testimony" in 8 U.S.C. § 1101(f)(6) does not. The Court's conclusion regarding the latter prohibition was not based merely on the absence of the term "material" in 8 U.S.C. § 1101(f). Rather, it was based on a careful analysis of statutory text. As the Court emphasized, a requirement of materiality may be appropriately inferred to be implicit in the term "misrepresentation" because "the word 'misrepresentation' . . . has been held to have that implication in many contexts – as the name of the common-law tort of misrepresentation (which requires a material falsehood) adequately demonstrates." *Kungys*, 485 U.S. at 781.

In this case, the key statutory term – "defraud" – has always carried an implicit requirement of materiality. To "defraud" is to influence, and influence is the essence of materiality. Unlike a "false statement" or "false testimony," which may or may not be intended to (or in fact) influence another person, fraud is *always*, by definition, designed to do so.

For all these reasons, consistent with *Wells*, Sections 1341, 1343 and 1344 can only properly be read as incorporating the element of materiality.

## II. RECOGNIZING MATERIALITY AS AN ELEMENT OF FEDERAL MAIL FRAUD, WIRE FRAUD AND BANK FRAUD IS IMPERATIVE TO PREVENT UNWARRANTED AND FRIVOLOUS CIVIL LITIGATION

### A. The Ruling in This Case Will Broadly Affect Civil As Well As Criminal Litigation

This case involves three criminal statutes, but its implications extend far beyond the criminal context. Most significantly, all of the three statutes at issue define offenses that are "predicate acts" for civil suits under the federal Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 ("RICO"). Indeed, mail and wire fraud are by far the most commonly relied-on predicate acts for civil RICO claims. *Agency Holding Corp.* v. *Mailey-Duff & Assocs. Inc.*, 483 U.S. 143, 149 (1987); *see also Holmes* v. *Securities Inv. Prot. Corp.*, 503 U.S. 258 (1992).

A ruling by this Court that materiality is not an element of federal mail fraud or wire fraud would invite a plethora of unwarranted civil suits under RICO. Already, civil RICO has spawned litigation far beyond the scope envisioned by Congress. *See, e.g., Sedima, S.P.R.L.* v. *Imrex, Co.*, 473 U.S. 479, 500 (1985) ("[I]n its private civil version, RICO is evolving into something quite different from the original conception of its enactors."); *see also id.* at 492 ("The 'extraordinary' uses to which civil RICO has been put appear to be primarily the result of the breadth of predicate offenses, in particular the inclusion of wire, mail, and securities fraud"). Although in the criminal context, prosecutorial discretion may serve as a check on improper use of RICO, no such discretion limits the appetite of civil RICO litigants. *See* William H. Rehnquist, *Remarks of the Chief Justice*, 21 ST. MARY'S L.J. 5, 10 (1989) ("[T]here is no such thing as prosecutorial discretion to limit the use of civil RICO by plaintiffs' attorneys. Any good lawyer who



can bring himself within the terms of the federal civil RICO provisions will sue in federal court because of the prospect of treble damages and attorney fees which civil RICO holds out."); *Schreiber Distributing, Inc.* v. *Serv-Well Furniture Co.*, 806 F.2d 1393, 1402 (9th Cir. 1986) (Kennedy, J., concurring) ("The reach . . . of the federal mail and wire fraud . . . statutes exists against a backdrop of prosecutorial discretion, however . . . [n]o such check operates in the civil realm.")[5]

The broad language in the mail fraud, wire fraud and bank fraud statutes enables relatively innocuous and common commercial disputes to be challenged as "racketeering activity" under RICO. *See* Ralph K. Winter, *Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America*, 42 DUKE L.J. 945, 960-62 (1993). As discussed further in Part II.B below, the requirement to prove materiality serves as a critical curb on an even broader sweep of RICO into areas of essentially innocuous business activity. Absent that curb, virtually any misleading comment in the course of regular business dealings, however trivial and ineffectual, could give rise to treble damages under RICO. Congress cannot plausibly have intended this result. *See* Rehnquist, *supra*, at 9-10 ("virtually everyone who has addressed the question agrees that civil RICO is now being used in ways that Congress never intended . . . . The legislative history of the RICO Act strongly suggests that Congress never intended that civil RICO should be used, as it is today, in ordinary commercial disputes far divorced from the influences of organized crime.").

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[5] In fact, this Court has refused to rely on "prosecutorial discretion" to ensure that criminal statutes are not extended beyond their proper reach. *See, e.g., Keyishian* v. *Board of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 599 (1967); *Baggett* v. *Bullitt*, 377 U.S. 360, 373-74 (1964).

Mail fraud, wire fraud and bank fraud are, of course, not the only predicate acts for RICO liability. *See* 18 U.S.C. 1961(1). Many of the other predicate acts are defined in statutes with language very similar to that of Sections 1341, 1343, and 1344, with no express reference to materiality. To date, courts have interpreted these other statutes implicitly to require proof of materiality. *See, e.g., United States* v. *West Indies Transport, Inc.,* 127 F.3d 299, 304 (3d Cir. 1997) (18 U.S.C. § 1546 ("procured by fraud")), *cert. denied*, 118 S. Ct. 700 (1998); *In re Natale,* 136 B.R. 344, 349 (Bankr. E.D.N.Y. 1992) (11 U.S.C. § 727(a)(4)(B) ("fraudulently . . . presented or used a false claim")); *United States* v. *Naftalin,* 579 F.2d 444 (8th Cir. 1978) (15 U.S.C. § 77q(a)(1) ("device, scheme, or artifice to defraud")), *rev'd on other grounds,* 441 U.S. 768 (1979); *DiSandro* v. *Makahuena Corp.,* 588 F. Supp. 889, 894 (D. Haw. 1984) (15 U.S.C. § 1703(a)(2)(A) ("device, scheme, or artifice to defraud")); *In re Farley,* 15 B.R. 11, 13 (Bankr. D. Or. 1981) (11 U.S.C. § 523(a)(2)(A) ("actual fraud")). Each of the statutes referenced above, since their language parallels that of the statutes at issue here, could serve to spawn a wide variety of unwarranted RICO claims if this Court were to find that materiality is *not* an element of federal mail fraud, wire fraud or bank fraud.

Although unwarranted RICO suits may be the most immediate threat in the civil law context of a finding that materiality is not an element of federal mail fraud, wire fraud or bank fraud, such a finding, independent of RICO, could also improperly expand liability under numerous other federal civil fraud statutes with language paralleling that in Sections 1341, 1343 and 1344 that have to date been read to imply an element of materiality. *See, e.g., Gilbert/Robinson, Inc.* v. *Carrie Beverage-Missouri, Inc.,* 989 F.2d 985, 992 (8th Cir. 1992) (15 U.S.C. § 1120 (providing a private cause of action for damages from another's "fraudulent declaration or representation" in a trademark registration)).



There can be little doubt that the Court's decision on materiality in this case will extend far beyond liability under Sections 1341, 1343 and 1344. Indeed, in just the one year since the Court decided in *Wells* that materiality is not an element of 18 U.S.C. § 1014, the lower federal courts, including but not limited to the court of appeals below, have held that materiality is not an element of a number of other federal "false statement" statutes when not expressly required by the language. *See, e.g., United States* v. *Condon,* 132 F.3d 653, 656 (11th Cir.) (relying on *Wells* in determining that materiality is not an element under 15 U.S.C. § 645(a)), *cert. denied sub nom., Brawner* v. *United States*, 118 S. Ct. 1547, (1998); *United States* v. *Tomeny,* 144 F.3d 749, 753 (11th Cir. 1998) (relying on *Wells* in holding that 16 U.S.C. § 1857(1)(l) does not require an element of materiality because none is mentioned); *United States* v. *DeCastro,* 113 F.3d 176, 179 (11th Cir. 1997) (relying on *Wells* in finding no implicit materiality element in 18 U.S.C. § 1010); *United States* v. *Boeing Co.,* No. C-1-95-375, 1998 WL 469884, at *4 (S.D. Ohio May 8, 1998) (relying on *Wells* in holding 31 U.S.C. § 3729 does not require materiality). Given the many statutes with language parallel to that of Sections 1341, 1343 and 1344, the Court's decision on materiality here inevitably will affect liability under a wide variety of statutes, both criminal and civil.

### B. Absent the Limiting Factor of Materiality, Liability Under RICO and Many Federal Civil Fraud Statutes Would Expand Far Beyond What Congress Intended

Materiality provides an objective criterion that requires a false representation to be one that a reasonable man would consider pertinent, relevant, or germane to the transaction and which would have influenced him in his action. *See Wells,* 117 S. Ct. at 926 ("natural tendency to influence") (quoting *Kungys* v. *United States,* 485 U.S. 759, 770 (1988)); *see also United States* v. *Gaudin,* 515 U.S. 506,

509 (1993); RESTATEMENT (SECOND) OF TORTS § 537-38 (1977); RESTATEMENT (SECOND) OF CONTRACTS §§ 162-64, 306 (1981). As discussed in Part I.A above and in the Brief for Petitioner, there is substantial evidence that Congress did not intend that the federal mail fraud, wire fraud, and bank fraud statutes criminalize trivial acts of deception that could not plausibly have such effect.

Absent the objective limit provided by the test of materiality, a wide range of innocuous acts would legally constitute "fraud." Any such act could be used as a pretext for escaping from bargains with which a party is dissatisfied on other grounds. Justice Holmes eloquently captured the value of the materiality element in stating: "The rule of law is hardly to be regretted, when it is considered how easily and insensibly words of hope or expectation are converted by an interested memory into statements of quality and value, when the expectation has been disappointed." *Deming* v. *Darling*, 20 N.E. 107, 108-09 (Mass. 1889); *see also Hall* v. *Johnson*, 2 N.W. 55, 57-58 (Mich. 1879) ("Immaterial representations, whether true or false, cannot be made the basis of relief .... Anything short of this would be unsafe, and would render it exceedingly dangerous for parties to conduct the ordinary business transactions of the day.").

Materiality marks the outer bounds on liability, denying plaintiffs the option of claiming reliance on trivial or inconsequential representations and hoping to find a sensitive or sympathetic jury. "By the requirement of materiality the law screens claims of fraud and excludes a kind of claim that would be too easy to make and too hard to disprove." James Fleming, Jr. & Oscar J. Gray, *Misrepresentation – Part II*, 37 MD. L. REV. 488, 500 (1978). Prosser explains that "[t]he most cogent reason for the requirement of materiality is that of promoting stability in commercial transactions. [Materiality provides] 'some assurance that the representee is not merely using the misrepresentation as a pretext for escaping a bargain that he



is dissatisfied with on other grounds.'" PROSSER AND KEETON *supra* § 108, at 753 (quoting Keeton, *Actionable Misrepresentation*, OKLA. L. REV. 56, 59 (1949)).

This Court has explicitly emphasized the importance of materiality as an element of fraud. *See Basic, Inc.* v. *Levinson*, 485 U.S. 224, 231 (1988) (explaining that it is important to be "careful not to set too low a standard of materiality" in order to exclude trivial omissions). *See also TSC Indus., Inc.* v. *Northway, Inc.*, 426 U.S. 438, 448-49 & n.10 (1976) (noting the "need to avoid the adverse consequences of setting too low a threshold for civil liability ... liability for insignificant omissions or misstatements"); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 384 (1970) (holding that materiality "serves the purpose of ensuring that a cause of action cannot be established by proof of a defect so trivial, so unrelated to the transaction"). *Cf. Farnsworth* v. *Duffner*, 142 U.S. 43, 47-48 (1891).

In *Kungys*, this Court described the effect of removing the element of materiality as "draconian." 485 U.S. at 780. Again, in *Wells*, the Court recognized that materiality operates as a limit to making "a surprisingly broad range of unremarkable conduct a violation of federal law." 117 S. Ct. at 931 (quoting *Williams* v. *United States*, 458 U.S. 279, 287 (1982)). While holding in these cases that materiality was not necessary to ensure that reasonable limits are observed in prosecutions under 18 U.S.C. § 1014 and 8 U.S.C. § 1101(f)(6), the Court made clear that its holdings were appropriate because the limiting function of materiality is served by the specific language of those particular statutes. *Wells*, 117 S. Ct. at 931 ("A literal reading of the statute will not normally take the scope of Section 1014 beyond the limit that a materiality requirement would impose."); *Kungys*, 485 U.S. at 780-81 ("literal reading of the statute does not produce draconian results").

The specific language of the mail fraud, wire fraud and bank fraud statutes does not provide the "built-in limitations" that the Court found to exist in Section 1014 and 8 U.S.C. § 1101(f)(6). Section 1014 prohibits, in relevant part, making a false statement or representation "*for the purpose of influencing* in any way the actions of" an FDIC-insured institution. (Emphasis supplied.) The Court in *Wells* reasoned that "a statement made 'for the purpose of influencing' a bank will not usually be about something a banker would regard as trivial," *i.e.*, this specific statutory language effectively precludes convictions for immaterial false statements. Sections 1341, 1343 and 1344, however, do not use the phrase "for the purpose of influencing" another person. In order to prevent convictions for immaterial misrepresentations in cases involving federal mail fraud, wire fraud or bank fraud, therefore, the jury must be specially instructed regarding the "influence" element – *i.e.*, it must be instructed on materiality.

The statute found in *Kungys* to have "built-in limitations" is likewise distinguishable from the mail fraud, wire fraud and bank fraud. That statute, 8 U.S.C. § 1101(f)(6), prohibits "giv[ing] false testimony for the purpose of obtaining any [immigration] benefits." In *Kungys*, the Court found that this language protects against convictions for immaterial falsehoods because, *inter alia*, it applies only to testimony – i.e., the limited body of false statements made orally under oath. *Kungys*, 485 U.S. at 780. Moreover, "testimony" does not include falsehoods in the form of concealments. *Id.* at 781.

The mail fraud, wire fraud and bank fraud statutes, however, are far broader: they cover virtually any form of communication as well as concealments. *See, e.g.*, *United States* v. *Rodolitz*, 786 F.2d 77 (2d Cir. 1986) (affirming conviction for mail fraud where defendant concealed from his insurer his company's involvement in the repair of his damaged roof); *United States* v. *Reinhold*, No. (S2) 97-CR-686 (AGS), 1998 WL 557583 (S.D.N.Y. Sept. 2, 1998) (denying motions for acquittal where defendants were convicted of wire fraud for concealing from lender the true nature of putative accounts receivable securing loan). Because Sections 1341, 1343 and 1344 lack the type of "built-in limitations" against the dangers of not requiring proof of materiality, that this Court identified in *Wells* and *Kungys* and because they do not otherwise embody "built-in limitations" to prevent such dangers, materiality is *not* a superfluous or unnecessary means of safeguarding against improper convictions for mail fraud, wire fraud or bank fraud.[6]



This Court itself, in an opinion regarding the mail fraud statute in its early embodiment, suggested that materiality is an element of federal mail fraud. *See United States* v. *New South Farm & Home Co.*, 241 U.S. 64, 71 (1916) ("Mere puffing, indeed, might not be within the meaning [of the mail fraud statute]."). That suggestion hints at the many scenarios in which, absent the check of the materiality test, defendants could be convicted for mail fraud, wire fraud or bank fraud based on merely trivial, irrelevant, or implausible misrepresentations, as illustrated below.

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[6] In civil fraud cases, reliance generally is an additional element, but materiality is not established by proof of reliance. Reliance is a subjective criterion, whereas materiality is an objective test. PROSSER § 108, at 749-50, 753 ("Materiality . . . provide[s] some objective corroboration to plaintiff's claim that he did rely." "Necessarily the test must be an objective one."). Therefore, while reliance might be inferred from a finding of materiality, the reverse is not true. *Cf. Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1096 (1991). Moreover, not all jurisdictions require actual reliance as an element of civil fraud actions. *See New Jersey Carpenters Health Fund* v. *Philip Morris, Inc.*, 17 F. Supp. 2d 324, 339 n.19 (D.N.J. 1998) (collecting cases).

### 1. *Trivial Misrepresentations*

The requirement to prove materiality in fraud cases, including under Sections 1341, 1343 and 1344, has properly protected against unwarranted liability for merely trivial misrepresentations. For example, in *United States* v. *McNeive,* 536 F.2d 1245 (8th Cir. 1976), the Eighth Circuit reversed a conviction under Section 1341 for lack of materiality. The defendant, a city chief plumbing inspector accepted unsolicited gratuities from a plumbing contractor for the issuance of plumbing permits. *Id.* at 1246. The issuance of such permits was a nondiscretionary duty and the inspector did not deviate from the plumbing code in any respect. *Id.* at 1252. Nor did the defendant actively conceal his activity. The court, observing the pervasiveness of "[t]he practice of tipping others as an expression of appreciation for the performance of ministerial tasks," characterized the situation as "a minor peculation, possibly a misdemeanor." *Id.* The court held to permit the mail fraud statute to reach such trivial conduct "would effect a further extension of § 1341 so as to cover all actions which might offend the Government's sense of personal propriety. This we refuse to do, particularly since [such a holding] would have far-reaching ramifications . . . ." *Id.*

Other cases provide similar examples of trivial conduct alleged to constitute fraud but recognized by courts to be non-actionable due to lack of materiality. *See, e.g., United States* v. *Davis,* 989 F.2d 244, 247 (7th Cir. 1993) (Posner, J.) (reversing federal bank fraud conviction because the government failed to prove that the defendant's misrepresentation in opening an account in the name of a mythical company was material to the bank's decision to allow him to deposit a wrongly obtained IRS refund check); *Lucas* v. *Long,* 94 A. 12, 15 (Md. 1915) (holding that land buyer's misrepresentations regarding plans for the land were not fraudulent because they "had no influence whatever upon the minds of the defendants."); *Finley* v. *Dalton,* 164 S.E.2d



763, 765 (S.C. 1968) (same); *Greenawalt* v. *Rogers,* 91 P. 526, 528 (Cal. 1907) (reversing judgment against defendant because his misrepresentation that he had no property was immaterial to plaintiff's decision to settle debt when the value of the property was only $400 and plaintiff knew defendant had other debts amounting to $11,500). *Cf. Fischer* v. *N.Y. Stock Exch.,* 408 F. Supp. 745, 754 (S.D.N.Y. 1976) (acknowledging that "there is a serious question of the materiality . . . . Damaging information . . . may well be[ ] immaterial if the person alleging [federal securities law] fraud subsequently becomes aware of even more negative facts and yet goes ahead with the transaction.").

Absent the requirement to show materiality in proving federal mail fraud, wire fraud, or bank fraud, "puffing" or seller's talk, perhaps the most common form of alleged misrepresentation, would give rise to liability, upsetting a vast body of well-established case law. *See, e.g., United States* v. *Brown,* 79 F.3d 1550, 1559 (11th Cir. 1996) (reversing federal mail fraud convictions because "reasonable jurors could not find that a person of ordinary prudence . . . would rely on . . . representations about the value or rental income of the GDC homes"); *United States* v. *Pearlstein,* 576 F.2d 531, 540 n.3 (3d Cir. 1978) (holding statements that company is "nationally known" and that product is "among the finest . . . in the world" are "not cognizable under federal mail fraud statute"); *Raab* v. *General Physics Corp.,* 4 F.3d 286, 289-90 (4th Cir. 1993) (affirming dismissal of action for federal securities fraud because "[n]o reasonable investor would rely on . . . loose prediction . . . statements. . . . Imposing [such] liability would put companies in a whipsaw, with a lawsuit almost a certainty."); *Williams* v. *Texaco Refining,* 53 F.3d 330 (4th Cir. 1995) (affirming dismissal of action against Texaco for misrepresenting the amount for which it would settle claims because the "statement was mere puffery made in arms-length settlement negotiations . . . simply not a

misrepresentation of material fact, an element essential to a fraud claim"). Congress cannot plausibly have intended to criminalize such conduct.

### 2. *Irrelevant Misrepresentations*

The element of materiality has also served as a check against unwarranted liability for fraud based on irrelevant representations. In *United States* v. *Regent Office Supply Co.*, 421 F.2d 1174 (2d Cir. 1970), for example, the Second Circuit reversed convictions under Section 1341 for lack of materiality. The only misrepresentation made by the defendants concerned a false pretext, such as a referral by a friend, for making sales calls. The court explained, "we are confronted with the proposition of simply declaring that any untrue statement designed to obtain the ear of a potential customer comes within the purview of the mail fraud statute. We believe it is prudent to avoid this pitfall." *Id.* at 1178. The court explained that the misrepresentations concerned *why* the salesmen were able to offer a bargain and not the goods being sold. The misrepresentations were immaterial because they were not capable of affecting customers' understanding of the sale or influencing their assessment of the value of the product. *Id.* at 1182.

Numerous other cases illustrate how the materiality element has served to prevent unwarranted liability for fraud, including in circumstances where, should this Court read materiality out of Sections 1341, 1343 and 1344, immaterial conduct could be grounds for federal criminal convictions. *See, e.g., Barlow* v. *McLeod,* 666 F. Supp. 222, 228 (D.D.C. 1986) (granting summary judgment against lender asserting RICO claim because it was immaterial to the transaction that the borrower introduced a third party as a "vice-president"); *Glass Coffee Brewer Corp.* v. *Embry,* 166 S.W.2d 818, 823 (Ky. 1943) (reversing judgment against defendant because misrepresentation to customer that no sales commission would be paid to agent was immaterial to agent who got



paid); *Babb* v. *Bolyard,* 72 A.2d 13, 17 (Md. 1950) (reversing judgment against defendant because plaintiff "had not 'the right, as a person of ordinary business prudence,' to rely upon the [defendant's] alleged misrepresentation of [another] dealer's price of new Buicks"); *Provident Loan Trust Co.* v. *McIntosh,* 75 P. 498 (Kan. 1904) (holding that misrepresentations regarding details of seller's title was immaterial when good title was still conveyed). These are only a few of the many real-world examples that serve to demonstrate the key role of materiality in checking unwarranted liability for fraud.

### 3. *Implausible Misrepresentations*

Requiring materiality also has served to prevent unwarranted liability for fraud based on implausible misrepresentations. In one of the earliest cases brought under the federal mail fraud statute, *United States* v. *Fay*, 83 F. 839, 839 (E.D. Mo. 1897), the defendant wrote to another, claiming that "he, the defendant, had some mysterious, superhuman power; among other things, to penetrate with mental vision into the bowels of the earth, and discover the location there of supposed hidden treasures . . . and assuring him that for $50 he would positively find certain treasures . . . ." The defendant was charged with having devised a scheme to defraud in contravention of the mail fraud statute.

The court quashed the indictment because although there was a scheme, it was not a scheme to defraud. Using the same materiality standard enunciated in *Gaudin* and *Wells,* the court held that "there is no scheme set out in the indictment reasonably *adapted to deceive persons of ordinary prudence.*" *Id.* at 840 (emphasis supplied). Comparing the scheme to one proposing "to take a person on a flying trip to the moon," the court explained: "I cannot believe it possible that a rational being possessed of ordinary prudence and sagacity, could or would be deceived by any

such irrational, visionary, and stupid pretense as was made by the defendant in this case." *Id.* at 839. *See also Miller* v. *Protrka,* 238 P.2d 753, 759-60 (Or. 1951) (holding sellers of motels did not make fraudulent representations because "a 100 per cent tenancy was at least an improbable expectation, if not an impossible one"); *Williams* v. *Rank & Son Buick, Inc.,* 170 N.W.2d 807 (Wis. 1969) (reversing judgment against defendant because misrepresentation in advertisement regarding air-conditioning was immaterial after purchaser examined car and took an unaccompanied one and one-half hour test drive); *Ellis* v. *Newbrough,* 27 P. 490, 493 (N.M. 1891) (reversing judgment against cult because representations regarding utopian life were immaterial to plaintiff's decision to join).

This Court has "often stated that when there are two rational readings of a criminal statute, one harsher than the other, [the Court is] to choose the harsher only when Congress has spoken in clear and definite language." *McNally* v. *United States*, 483 U.S. 350, 359-60 (1987) (citing *United States* v. *Bass*, 404 U.S. 336, 347 (1971); *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S 218, 221-22 (1952)). Consistent with this doctrine and other established principles of statutory construction, the Court should hold that materiality is element of federal mail fraud, wire fraud and bank fraud.

## CONCLUSION

For the reasons set forth above, a*mici* respectfully urge the Court to reverse the decision below and to hold that materiality is an element of federal mail fraud, bank fraud and wire fraud.



Respectfully submitted,

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November 27, 1998